

IN THE  
PUBLIC PROCUREMENT APPEALS AUTHORITY  
AT DAR ES SALAAM  
APPEAL CASE NO. 36 OF 2018-19  
BETWEEN  
M/S CHINA GEZHOUBA GROUP COMPANY  
LIMITED.....APPELLANT  
AND  
DAR ES SALAAM WATER AND SEWERAGE  
AUTHORITY.....RESPONDENT

RULING

CORAM

- |                                     |   |               |
|-------------------------------------|---|---------------|
| 1. Hon. Justice (rtd) Sauda Mjasiri | - | Chairperson   |
| 2. Dr. Leonada Mwangike             | - | Member        |
| 3. Adv. Rosan Mbwambo               | - | Member        |
| 4. Ms. Florida Mapunda              | - | Ag. Secretary |

SECRETARIAT

- |                           |   |               |
|---------------------------|---|---------------|
| 1. Mr. Hamisi O. Tika     | - | Legal Officer |
| 2. Ms. Violet S. Limilabo | - | Legal Officer |

#### FOR THE APPELLANT

1. Dr. Fred S. Ringo - Advocate
2. Wu Bo - Chief Representative of the Appellant
3. Wen Ju - Marketing Manager
4. Ms. Nina Mabiba - Lawyer

#### FOR THE RESPONDENT

1. Ms. Hellen Lubogo - Director of Procurement
2. Ms. Neema N. Mugassa - Legal Officer

This Appeal was lodged by M/s China Gezhouba Group Company Limited (hereinafter referred to as "the Appellant") against Dar es Salaam Water and Sewerage Authority commonly known by its acronym "Dawasa" (hereinafter referred to as "the Respondent").

The Appeal is in respect of Tender No. AE/033/2018-19/W/38 for the Construction of Reservoir, Water Transmission Pipeline and Pump Station for Kimbiji Water Supply Works (hereinafter referred to as "the Tender").

According to the documents submitted to the Public Procurement Appeals Authority (hereinafter referred to as "the Appeals Authority"), the background of the Appeal may be summarized as follows:

On 25<sup>th</sup> January 2019, the Respondent through the Daily News Newspaper invited eligible Civil Contractors registered as Class II and above to bid for the above mentioned Tender.

The Tender was conducted through the International tendering procedures specified in the Public Procurement Act, 2011 (hereinafter referred to as "the Act") as well as the Public Procurement Regulations, 2013, GN.NO. 446 of 2013 as amended (hereinafter referred to as "the Regulations"). The deadline for the submission of tenders as contained in the advertisement was on 19<sup>th</sup> February 2019.

The Appellant having read the advertisement and the contents thereof lodged a complaint to the Respondent's Accounting Officer on 9<sup>th</sup> February 2019, objecting to the advertisement of the said tender on the ground that the scope of the advertised tender is part and parcel of the contract it had signed with the Respondent on 18<sup>th</sup> May 2018. Therefore, the Appellant requested the Respondent to clarify as to why it had floated a new tender without consulting it. However, the Respondent did not respond.

On 12<sup>th</sup> March 2019, the Appellant wrote another letter to Respondent asking for a response of its letter dated 9<sup>th</sup> February 2019. It is on record that while the Appellant wrote the reminder letter on 12<sup>th</sup> March 2019, the Respondent on 11<sup>th</sup> March 2019 replied to the Appellant's letter dated 9<sup>th</sup> February 2019. In the said letter, the Respondent informed the Appellant that it is implementing several water projects in Dar es Salaam as a short term intervention

using internal fund to develop five bore holes out of twenty located at Kimbiji and Mpera. It also informed the Appellant that its long term development project of Kimbiji was still valid save that its effectiveness depended on the signing of the financing agreement between the Exim Bank of China and the Government of Tanzania, which is yet to be signed. Aggrieved further, on 20<sup>th</sup> March 2019, the Appellant lodged this Appeal.

Upon being notified of the Appeal by the Appeals Authority, the Respondent apart from responding to the grounds of Appeal raised Preliminary Objections (POs) on points of law as hereunder:-

1. That, the appeal is hopelessly out of time;
2. That the Appeals Authority has no jurisdiction to entertain the Appeal at hand; and
3. That the Appellant has no *locus standi* in this tender

The Appeals Authority, before proceeding with the merits of the Appeal, found it prudent to first determine the POs so raised.

#### SUBMISSIONS BY THE RESPONDENT ON THE PO

1. That, the Appeal is hopelessly out of time.

In support of this PO, the learned counsel for the Respondent argued that, assuming that the Appellant has participated in the tender subject to the Appeal and that it has a *locus standi*, then, its Appeal is hopelessly out of time.

The Counsel submitted that the advertisement for this tender was made on 25<sup>th</sup> January 2019 by the Respondent. However, the

Appellant became aware of the circumstances leading to a dispute and lodged its complaint to the accounting officer on 9<sup>th</sup> February 2019. The seven working days within which the Accounting Officer ought to have issued its written decision ended on 19<sup>th</sup> February 2019. By virtue of Section 96 (7) and Section 97 (2) (a) of the Act, the Appellant ought to have filed its Appeal to the Appeals Authority by 28<sup>th</sup> February 2019. To the contrary, it did not do so. The Appeal has been filed to this Appeals Authority on 20<sup>th</sup> March 2019, which is almost 13 working days beyond the prescribed time under the law.

She submitted further that the Respondent's letter dated 11<sup>th</sup> March 2019 cannot be construed as the initial date in which the Appellant's cause of action arose. The said letter was a mere courtesy to the Appellant since it kept on requesting for the administrative review and the Respondent deemed it necessary to respond to the letters.

2. That the Appeals Authority has no jurisdiction to entertain the Appeal at hand.

Regarding this point, the counsel for the Respondent submitted that the Appellant is complaining against breach of contract they had sign with the Respondent. Reading Clause five of the Appellant's statement of Appeal (Reliefs part), it is clear that the Appellant's claims relate to the previous contract and not in relation to the floated tender. Thus, its complaints are contractual in nature. Clause 20 of the contract provides the manner in which disputes between the parties should be resolved and does not involve filing an appeal

to the Appeals Authority. Therefore, the Appeal at hand has no legs to stand on since the same does not relate to the tender.

3. That the Appellant has no *locus standi* in this tender

The counsel argued that, section 95 of the Act, read together with Regulation 104 of GN.NO.446 of 2013, allows an aggrieved tenderer or a tenderer who claims to have suffered or that may suffer loss or injury as a result of breach of duty imposed on a procuring entity to lodge a complaint and ultimately appeal to this Appeals Authority in terms of Sections 96 and 97 of the Act.

The key word provided in the above provisions is the word "tenderer", which has been defined under Section 3 of the Act to mean "a natural or legal person or group of such persons participating or intending to participate in procurement proceedings with a view to submitting a tender in order to conclude a contract and includes a supplier, contractor, service provider or asset buyer".

Based on the above provisions, it is the Respondent's view that the Appellant has never participated in the current tender floated by the Respondent or intended to participate in the procurement proceedings with a view of submitting its tender. The Appellant neither purchased nor submitted its tender document to the Respondent regarding this tender. Until 19<sup>th</sup> February 2019 which was the deadline for the submission of tenders, the Appellant's bid was not amongst the submitted bids.

She expounded further that, since the Appellant falls in neither category, it cannot have any right to question the Respondent regarding this tender process, let alone appealing to the Appeals Authority. It is a stranger to the process, and that in terms of Rule 4 of the Public Procurement Appeals Rules, GN.NO.411 of 2014; it lacks *locus standi* to challenge the tender process. Finally, the counsel prayed for the dismissal of the Appeal with costs.

#### APPELLANT'S REPLY ON THE PO

In response to the Respondent's submissions, Dr. Ringo, counsel for the Appellant, started his submissions regarding the *locus standi* of the Appellant and the jurisdiction of the Appeals Authority to entertain the Appeal at hand.

He submitted that, the Act as well as Rule 3 to the Appeals Rules, GN. NO.411 of 2014, as amended defines the word "tenderer" to include a supplier, contractor, service provider or asset buyer. The Appellant in this Appeal is a contractor who has a contract with the Respondent. According to the definition of the word "contractor" provided in the Act, it includes a firm, company, corporation, organization, partnership or an individual person engaged in construction or building work of any kind and who is, according to the context, a potential party or a part to a procurement contract with the procuring entity. He stated that the Appellant had signed a contract with the Respondent in May 2018. It is on this basis the Appellant acquires the rights over the tender. He admitted that the Appellant as a contractor engaged by the Respondent did not

participate in the current tender process since it had already won such a tender before, and that the current tender is part and parcel of the previous tender which it had already been contracted by the Respondent. Therefore, the Appellant's right regarding the tender originates from the contractual obligations which it has with the Respondent.

The Counsel argued that, the Appellant's interest in the contract has been affected and injured. Thus, for someone to have a *locus standi*, it must have an interest over the respective matter. The advertisement by the Respondent for the tender was injurious to the whole project the Appellant had been contracted. The counsel emphasized that the floated tender is part of the signed contract and the same are inseparable.

With regards to the jurisdiction of the Appeals Authority, Counsel submitted that Section 97(3) of the Act allows the Appellant to come straight to the Appeals Authority upon entry into force of the procurement contract. He explained however that though there is a binding contract between the Appellant and the Respondent, the same is not yet in force due to some technical aspects in the contract. It was therefore, not possible for the Appellant to appeal straight to the Appeals Authority prior to going to the Respondent's Accounting Officer. Therefore, the provisions of the contract cited by the Respondent could not have been effected since the contract is not yet in force.

On the issue of time, the counsel submitted that the Appellant was made aware of the circumstances leading to a dispute on 9<sup>th</sup> February 2019. It then wrote to the Respondent's Accounting Officer requesting it to annul the ongoing process. The Respondent responded to the request on 11<sup>th</sup> March 2019. He conceded later on that the Appeal was filed to the Appeals Authority out of time.

In her brief rejoinder, the learned counsel for the Respondent reiterated its position that the Appellant was not a bidder for the tender under Appeal, thus, it lacks the *locus* to come to the Appeals Authority; and its contentions are in relation to the contract and not to the tender.

#### ANALYSIS BY THE APPEALS AUTHORITY

Having gone through the filed documents together with the oral submissions by the parties on the POs, the Appeals Authority is of the view that there are three main issues calling for determination, and these are;

1. Whether the Appellant has *locus standi* in this tender;
2. Whether the Appeals Authority has jurisdiction to entertain the Appeal at hand; and
3. Whether the Appeal is hopelessly out of time.

After formulation of the main issues, the Appeals Authority proceeded to resolve them as hereunder:-

1. Whether the Appellant has *locus standi* in this tender

In resolving this issue, the Appeals Authority having revisited the documents submitted before it, observed that the Appellant and the Respondent signed the contract for Kimbiji Well Field Development, Transmission, Water Distribution and Non Revenue Water Reduction Project in Dawasa Service Area, Tender No. AE/033/2017-2018/W/12 on 18<sup>th</sup> May 2018. However, the contract is yet to be executed as the agreed financial arrangements by the parties are not yet in place. The Appeals Authority observed further that the current dispute between the parties emanates from tender advertisement made by the Respondent on 25<sup>th</sup> January 2019 for Tender No. AE/033/2018-2019/W/38 for the Construction of Reservoir, Water Transmission Pipeline and Pumping Stations for Kimbiji Water Supply Works. The Appeals Authority observed that the two tenders are distinct and the procurement processes for each of them are different. It was observed further that the Appellant did not participate in the current tender floated on 25<sup>th</sup> January 2019, which is a subject matter of this Appeal. It neither purchased nor submitted the tender to the Respondent.

The Appeals Authority revisited Sections 95, 96 and 97 of the Act read together with Regulation 104 of GN.NO.446 of 2013 as amended as well as Rule 5 of the Appeals Rules cited by the parties. It observed that the provisions allow an aggrieved tenderer to file its complaint to the accounting officer of the respective procuring entity and finally appeal to this Appeals Authority in case of any

grievance. The Act provides a definition as to who is a tenderer, under Section 3 of the Act.

Sec.3 " it means *any natural or legal person or group of such persons participating or intending to participate in procurement proceedings with a view to submitting a tender in order to conclude a contract and includes a supplier, contractor, service provider or asset buyer*"

From the above quoted provision, the Appeals Authority is inclined to agree with the Respondent that for a person to have a *locus standi* in the procurement process, it presupposes that, the respective complainant whether a supplier, contractor or an asset buyer has purchased the tender document from the respective procuring entity. This is not the case with the Appellant in the current tender.

The above notwithstanding, the Appeals Authority considered the argument by the learned counsel for the Appellant that the Appellant is a contractor whose interest in the executed contract is at stake, and observed that, indeed, it is a contractor within the meaning of the Act. However, it was not privy to this tender for reasons stated above. The Appellant is a contractor with regard to tender No. AE/033/2017-2018/W/12 awarded to it in May 2018. It is not a contractor in respect of the disputed tender. The learned counsel's argument therefore has no basis.

In view of the above findings, it is the Appeals Authority's conclusion that the Appellant has no *locus standi* in this tender.

2. Whether the Appeals Authority has jurisdiction to entertain the Appeal at hand.

In resolving this issue, the Appeals Authority revisited the pleadings by the parties and observed that the major grounds of the Appeal relates to the contract signed on 18<sup>th</sup> May 2018. It is the Appeals Authority's view that the Appeal centers on the breach of the contractual terms arising from the contract executed between the parties which does not fall under its mandate. The issues between the parties under the contract need to be resolved under the terms and conditions of the specific contract. The Appeals Authority therefore, agrees with the Respondent that the Appellant is supposed to pursue its rights under the contract, which is outside its jurisdiction. We considered the argument by the learned counsel for the Appellant that as the contract was not yet in force due to technical reasons; the only avenue was through the Appeals Authority. This argument is not tenable as attractive as it may be. The Appeals Authority has no powers to determine issues relating to contractual obligations between the parties. The Appeals Authority's mandates are in relation to the disputes arising during a procurement process and not otherwise. Thus, it cannot delve on matters that are beyond its mandate.

Accordingly, the Appeals Authority's conclusion regarding this issue is that it has no jurisdiction to entertain the Appeal.

In view of the above findings, the Appeals Authority agrees with the Respondent that the Appellant has no *locus standi* in the tender

under dispute and that the Appeals Authority has no jurisdiction to entertain the Appeal at hand. Consequently, the POs are hereby upheld and the Appeal is dismissed.

Based on our findings on issues number 1 and 2 above, the Appeals Authority need not delve on the third issue.

Each party to bear its own costs. It is so ordered.

The Right to Judicial Review as per Section 101 of the Act is explained to the parties.

This Ruling is delivered in the presence of the Appellant and the Respondent this 25<sup>th</sup> April 2019.



JUSTICE (RTD) SAUDA MJASIRI

CHAIRPERSON

MEMBERS:

1. DR. LEONADA MWAGI KE.....

2. ADV. ROSAN MBWAMBO.....